IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.101 of 2001

Mrs.Meera Raju Mandlik .. Appellant

V/s

Shri Raju Martand Mandlik .. Respondent

Shri N.K.Mudnaney for the Appellant

Shri Rajiv Desai i/b N.B.Shah for the Respondent

CORAM:S.B.MHASE AND

S.R.SATHE,JJ.

DATED:12th July, 2005

ORAL JUDGMENT :- (Per S.R.SATHE,J.)

1. The Appellant original Respondent in Marriage Petition NO.595 of 1998 has preferred this Appeal against the judgment and order passed by the Court of Family Court No.2, Pune, whereby the petition for divorce filed by Respondent-husband claiming divorce on the ground of cruelty and desertion was allowed,

2. The brief facts giving rise to this appeal are as under :

. The marriage of appellant Meera took place with respondent Raju Mandlik as per Hindu Rites on 11-5-1993 at Chembur, Mumbai. Both of them are highly qualified

and it was their arrnaged marriage. After marriage both of them went to Mahabaleshwar for honeymoon during the period from 13-5-1993 to 16-5-1993. Thereafter for 2 days both of them stayed at Chembur and then they returned to the house of respondent at Lonikand, Pune and stayed there upto 22-5-1993. As respondent husband was serving in Coco Cola bottling company at Gambia, West Africa, both of them went to Gambia on 26-5-1993. They had happy time at Gambia . On 21-7-1994 appellant wife returned to India for her delivery. She was received at the Air port, Mumbai by her in-laws and they took her to their house at Pune. Customary rituals of **Dohaljevan** were celebrated at Pune. After few days she returned to her maiden home at Chembur. On 30-9-1994, appellant wife gave a birth to a male child. When it was informed to in-laws of the appellant they went to Chembur to see their daughter-in-law and grand son. During the period when appellant was in the hospital, the respondent husband contacted her on telephone from Gambia.

3. On 18-3-1995 the respondent husband returned to India for short stay. However, after returning to India he straightway went to Pune. According to him the appellant wife was informed about his arrival but she did not return to Pune. As the respondent was suffering from Ulcer and Appendix, he was admitted at Dindayal Hospital, Pune during 9-5-1995 to 18-5-1995 and required

to undergo surgery. It is the case of the respondent husband that though the appellant was informed about his illness and operation she did not contact him nor she returned to Pune. He waited for her till 2-6-1995 but she did not come. Ultimately, the respondent returned to Gambia on that day to join his duties.

4. On 21-6-1996 the respondent husband returned to India and tried to contact the appellant. On 26-6-1996 the appellant told the respondent that he should come to the residence of respondent's friend Kumar at Vashi and they will have a talk at his place. Accordingly, respondent went to his friend Kumar's house at Vashi. The appellant had also come there. Both of them talked to each other and respondent took the appellant and son to Pune on 27-6-1996. According to respondent there appellant used to pick up quarrels on trifle matters. On 2-7-1996 naming ceremony of newly born child took place and he was named as Palash alies Mehul. According to the respondent he had invited his in-laws for the said naming ceremony **(Barse)** but they did not come. On 3-7-1996 the mother of appellant contacted her on telephone and expressed her displeasure as the grand son was named as Palash. On that day the appellant picked up quarrel with respondent and expressed that she will not stay at Pune with her in-laws. In order to avoid any further dispute the respondent took the appellant for South India tour on 4-7-1996. They returned from

said tour on 7-7-1996 at about 6-00 p.m. During the said tour both of them had happy time. On the day they returned to Pune, appellant's parents went to the house of respondent and told him that they would take Meera i.e. appellant with them. Naturally, it was not liked by the respondent husband and he told them that they should not take her. However, they picked up quarrel with respondent and his parents. On the next day i.e. on 8-7-1996 appellant's brother went to the house of respondent and again there was some quarrel and they took appellant with them. Not only that but at the instance of mother of the appellant, the appellant went to Kothrud Police Station and filed a false complaint against respondent husband and his parents for the offences punishable under section 498A, 323, 504, 506 read with 34 of IPC. On the basis of the said complaint, Police registered the offence and arrested the respondent and his parents. However, the said case ultimately resulted in their acquittal. According to respondent on 8-7-1996 as per demand made by the appellant he handed over her ornaments to her at Kothrud Police Station. The appellant also filed an application under Sections 18 and 20 of Hindu Adoption and Maintenance Act against the respondent husband in the Family Court, Bandra, Mumbai. As the appellant had treated respondent with cruelty by filing a false Criminal case and deserted him without any cause on 8-7-1996, he also filed Petition for divorce bearing

No.1012 of 1996 in the Family Court at Pune.

5. In the maintenance petition filed by the appellant she submitted an application before the Court and prayed that the respondent be restrained from going to Gambia and his passport be impounded.

6. During the pendency of the maintenance petition the appellant and respondent agreed to put an end to their dispute and file Consent terms. Accordingly, on 4-2-1997 both of them signed the consent terms whereby they agreed to unconditionally withdraw the allegations made against each other. It was also agreed that respondent should withdraw his Marriage petition No.1012 of 1996 filed for divorce in the Family Court at Pune. Respondent agreed to take appellant to Gambia and make the necessary arrangement for tickets of appellant and son Mehur @ Palash. Thus both of them agreed to stay together. On 5-2-1997 respondent went to Gambia. After reaching there he contacted the appellant and also sent the tickets for appellant and son Mehur @ Palash. The appellant wife however submitted an application dated 1-4-1997 in the Family Court, Mumbai and withdrew herself from the consent terms. Not only that but she filed separate application under Order 39 Rule 2A of Code of Civil Procedure and submitted that respondent has left India though there was an injunction order against him and as such he be detained in civil prison.

The respondent gave reply to the said application and ultimately the Court dismissed the said application. The appellant refused to take tickets provided by respondent and declined to go to Gambia. All this caused further mental agony to the respondent. In the meantime as agreed in the Consent Terms he had withdrawn his divorce petition NO.1012 of 1996 filed in the Family Court at Pune.

7. As the appellant had withdrawn herself from consent terms and treated respondent with cruelty and left him on 8-7-1996 and thereafter never returned to him and thus deserted him for a continues period of 2 years, he filed second petition for divorce against his wife in the Family Court at Pune.

8. The appellant filed her written statement at Exh.21 and opposed the petition. She contended that as she had filed petition for maintenance in the Family Court, Mumbai with a view to give go bye to the said petition and harass her, the respondent husband filed false petition for divorce. She admitted that after her marriage with respondent, for few days they stayed together at Pune and thereafter she had accompanied the respondent to Gambia. There she lived happily with respondent and when she was pregnant, on 18-3-1995 she returned to Mumbai. She also admitted that she gave birth to a male child on 30-9-1994. She however,

contended that when respondent had come to India and was aware that appellant and son were at Mumbai he did not care to see them and on the contrary straightway went to Pune and thus it indicated that relations between appellant and respondent were strained since the birth of Palash. The appellant further contended that during the period when she was residing at Mumbai, at her maiden home, the respondent and his parents had contacted her on telephone from time to time and given threats and as a result of the same there was apprehension in her mind that respondent and his parents would cause hurt to her and then in that event it would not be possible for her to go to any other place at Pune and as such she did not go to Pune. According to her she was never informed about the illness of respondent or about surgery which he had undergone at Pune. It is her case that respondent used to tell her that she should behave as per the wishes of his parents and gave threats that if she would not behave accordingly she would be required to face grave consequences.

9. The appellant further contended that meeting of the parties at Kumar’s residence at Vashi would indicate that respondent was not ready to take the appellant with him. However, considering the future of their son she agreed to accompany respondent to Pune and accordingly they went to Pune on 26th/27th June 1996. It is her case that the during period from 26th June to 2nd July

1996, respondent's parents were insulting and taunting her and had also given threats. Though it was agreed to name the child as Mehul, at the instance of the respondent's parents he was named as Palash.

10. The appellant also contended that she had informed her parents about the ill-treatment meted to her and hence her parents had come to Pune on 7-6-1996 to take her with them. Respondent and his parents used abusive language to them and picked up quarrel and hence she filed a complaint against them at Kothrud Police Station.

11. She admitted that consent terms were signed by her but contended that before any order was passed on the consent terms, the respondent husband after reaching Gambia gave threats to her on telephone and as a result of the same she was constrained to withdraw from the consent terms. According to her, the respondent had sent the air tickets only to make a show. His real intention was to get rid of maintenance application and then harass her. When she realised the said intention she filed an application for withdrawing from the consent terms. Lastly, she contended that she never ill-treated the respondent nor deserted him but as the respondent and his parents treated her with cruelty, she was constrained to leave her matrimonial home. Hence on all these grounds the appellant wife prayed for

dismissal of the petition.

12. In order to prove his case the respondent husband examined himself at Exh.13 and his father at Exh.16. As against this the appellant wife examined herself at Exh.33. Both the parties produced certain documents.

13. After considering the evidence adduced by both the parties the learned Family Court Judge, Pune came to the conclusion that the Respondent husband has proved that the appellant treated him with cruelty and he was deserted by her for a continuous period of 2 years immediately preceding the filing of the petition. Naturally, the learned Judge passed decree for divorce in favour of the respondent husband.

14. The above mentioned decree is challenged by the appellant wife in this appeal. Shri Mudnani, learned Advocate for the appellant has urged four points before us. Firstly, he submitted that as respondent had withdrawn his earlier Petition NO.1012 of 1996 unconditionally, the subsequent petition filed by him was not maintainable in view of the provisions of Order 23 Rule 1(4) of Code of Civil Procedure. Secondly, he canvassed before us that that as in the consent terms Exh.34, both the parties have stated that both of them have agreed to unconditionally withdraw the allegations made against each other, all earlier alleged acts of

cruelty as well as the act of desertion stand condoned and as such respondent husband is not entitled for a decree of divorce on the ground of cruelty and desertion. Thirdly, he submitted that there is no evidence with regard to acts of cruelty subsequent to withdrawal of the earlier petition and the learned Family Court Judge erred in considering the earlier conduct of the appellant. Lastly, he submitted that period of 2 years had not lapsed from withdrawal of earlier petition and as such it cannot be said that appellant had deserted the respondent for a period of 2 continues years immediately preceding the filing of petition. He therefore submitted that the appeal be allowed and the decree for divorce be set aside.

15. Mr.Rajiv Desai, learned advocate for respondent supported the judgment and order passed by the Family Court Judge and submitted that the contention with regard to the application of Order 23 Rule 1(4) of Code of Civil Procedure was not taken by the appellant wife in her written statement. Besides this, the respondent husband had in fact acted in pursuance of consent terms and withdrawn the earlier petition but the appellant backed out from the said consent terms and as such it cannot be said that there was a real withdrawal of his earlier petition as contemplated under Order 23 Rule 1(4). Nor it can be said that the earlier conduct or action of the appellant was condoned by the respondent.

Lastly, he submitted that there is sufficient material to show that the appellant wife caused mental cruelty to respondent and deserted him on 8-7-1996. He, therefore, submitted that appeal be dismissed.

16. It is not in dispute that the marriage of appellant and respondent took place at Chembur on 11-3-1993 and after few days both of them went to Gambia, West Africa on 26-5-1993. They lived happily at Gambia and when appellant was pregnant she returned to India on 21-7-1993 and immediately went to Pune at the residence of respondent's parents. She stayed there for few days and then went to her maidan home and on 30-9-1994 gave birth to a male child. Thereafter some dispute started at the time of naming ceremony. It is also an admitted fact that on 8-7-1996 the Appellant wife left her matrimonial home and went to Chembur at her maiden home and thereafter she filed a petition for maintenance in the Family Court at Bandra,Mumbai. Respondent husband also filed Petition No.1012 of 1996 for divorce in the Family Court, Pune. It is not in dispute that on 4-2-1997 both the parties signed the consent terms in the maintenance Petition and in pursuance of the same the Respondent husband withdrew his divorce petition unconditionally.

17. The first and foremost objection of the learned Advocate for the Appellant wife is that present petition

filed by Respondent husband for divorce is not maintainable in view of the provisions of Order 23 Rule 1(4) of Code of Civil Procedure. It would be worthwhile to see what the said provision says :

> Order 23 Rule 1(4):
>
> 1. Withdrawal of suit or abandonment of part of claim -(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.
>
> (2) An application .. . . .
>
> .....
>
> (3) Where the Court is satisfied,-
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,
>
> it may, on such term as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with

liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff -

(a) abandons any suit or part of claim under sub rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

18. At the outset it must be mentioned that admittedly the earlier petition was withdrawn by the Respondent husband unconditionally. Besides this, while considering the above mentioned provision one should not take into consideration only the technical aspect but must see the object with which the above provision has been made. The object of the rule is not to enable the plaintiff, after he has failed to conduct his suit with proper care and due diligence, to obtain an opportunity of commencing the trial afresh in order to avoid the

result of his previous bad conduct of the case so as to prejudice the other party. It is needless to say that the right given to party under Order 23 Rule 1 of Code of Civil Procedure has to be necessarily viewed in the context of the facts of each case. So, in order to find out as to whether respondent husband can be non suited on this technical provision, it is absolutely essential to see the circumstances under which the respondent husband withdrew his earlier petition.

19. The copy of the consent terms signed by both the parties on 4-2-1997 is produced at Exh.34. As per the said consent terms both the parties agreed to give up their allegations against each other and it was decided that respondent should withdraw his petition NO.1012 of 1996. Even the appellant wife has also clearly admitted that it is only because of the said condition embodied in the consent terms the respondent withdrew the said petition and there was no other reason for the same. Admittedly, the appellant wife subsequently backed out from the consent terms and after a period of two months from the consent terms, she submitted an application seeking permission to withdraw from the consent terms. It is also an admitted fact that appellant did not comply the conditions which she was supposed to comply in pursuance of the said consent terms. It is also admitted that the Court has not actually recorded the said consent terms and disposed of the maintenance

petition. So, the consent terms have in fact not come into effect or operation. Thus, it is quite evident that it was not a case where the respondent sue moto, voluntarily or unilaterally decided to withdraw the petition. As a part of consent terms he withdrew the said marriage petition but when we find that as the said consent terms have not been actually put into effect by the parties, the earlier withdrawal of the petition cannot be considered to be a real, genuine withdrawal of the petition as contemplated under Order 23 Rule 1(4) of Code of Civil Procedure. Certainly, it was also not a case that there was any lacuna or defect in the petition or that due to any negligence on the part of the Petitioner he was required to withdraw the said petition. So, it was certainly not a case where the respondent husband had abandoned part of his claim unconditionally.So, taking into consideration the peculiar facts and circumstances of this case we are not inclined to accept the argument advanced by the learned Advocate for the appellant wife when he says that present petition is not maintainable in view of Order 23 Rule 1(4) of Code of Civil Procedure.

20. The two authorities cited by the learned Advocate for the appellant on this point viz. Narayan Jethanand and Ors. V/s Asapuri Vijay Saw Mill **AIR 1995 Guj. 194** and Secretary, Bangalore Turf Club and Ors. V/s Kishan Srivatsava and Anr. **AIR 1996 Kar. 306** are not

applicable to the facts of the present case. In the above stated two cases the earlier suit was withdrawn by the plaintiff unconditionally and subsequent suit was for the same subject matter. Naturally, it was held that such subsequent suit is not maintainable. However, in the instant case as pointed out by us above, in view of the peculiar circumstances it cannot be said that there was withdrawal of a suit in real sense as contemplated under Order 23 Rule 1(4) of Code of Civil Procedure.

21. The second limb of the argument of the learned Advocate for the appellant is that in the consent terms it was mentioned "the Petitioner and Respondent have agreed to unconditionally withdraw the allegations made against each other", and so the alleged acts of cruelty/desertion of appellant wife are condoned by the respondent husband and as such he can not claim divorce on the same grounds again. Firstly, it must be noted that if we see the present petition, then it is crystal clear that respondent has claimed divorce not only on the basis of the conduct of the appellant wife prior to withdrawal of earlier divorce petition but even on the basis of subsequent conduct of the appellant. Here again it must be noted that when the consent terms mentioned above are not at all recorded by the Court and the appellant without any just cause has withdrawn from the said consent terms, in the eyes of law there are in

fact no consent terms in existence. So, by no stretch of imagination it can be said that respondent has actually given up the allegations made by him against appellant in earlier petition. The consent terms, under such circumstances shall have to be ignored. When such is the position, there is in fact no question of condonation. While considering this aspect we have to bare in mind the following observations made by the apex court in a case Dr.N.G.Dastane V/s Mrs. S.Dastane **(1975) 2 SCC 326** to which our attention is drawn by Advocate Shri Rajiv Desai for the respondent.

> "condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. No matrimonial offence is erased by condonation. It is obscured but not obliterated. Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence. Condoned cruelty can therefore be revived, say be desertion or adultery. "Condonation" under section 23(1)(b) therefore means conditional forgiveness, the implied condition being

that no further matrimonial offence shall be committed."

22. Thus, from the facts of the present case we have absolutely no hesitation to hold that by virtue of mere signing the consent terms or by withdrawing the earlier divorce petition the respondent had not at all condoned the alleged acts of cruelty/desertion of appellant. So, there is no substance in the argument advanced by the learned Advocate for the appellant wife in this behalf.

23. It is the case of respondent husband that appellant treated him with cruelty, as contemplated by Section 13(1)(ia) of Hindu Marriage Act, 1955 (Hereinafter referred to as the said Act). Cruelty may be express or implied, it may be by words or conduct, it may be intentional or unintentional. From the averments in the petition, it is very clear that there is no question of any physical cruelty. The conduct which causes and is intended to cause suffering to one’s spouse and which ultimately makes matrimonial life intolerable for the spouse, has to be termed as mental cruelty; contemplated under Section 13(1)(ia) of the said Act. It is well settled that while considering the question of cruelty acts of spouses are to be assessed bearing in mind the social status of the parties, their customs and traditions, their educational level and environment in which they live.

24. The first act of cruelty alleged by the respondent is that after the time the appellant gave birth to a male child he had contacted appellant on telephone from Gambia when she was in the hospital. However, after the time she was taken to her maiden home, when he contacted her, there was no response. Not only that but on 18-3-1995 when he had come to India and appellant was informed about the same she did not contact him nor she returned to matrimonial home at Pune though he was very much there. Besides this, the respondent has also stated in his deposition at Exh.13 that at that time his health was not good and he had some appendix and ulcer problem and for that purpose he was required to undergo operation at Pune. Not only that but during the period from 9-5-1995 to 16-5-1995 he was admitted in hospital at Pune but at that time also the appellant did not care to enquire about him or to meet him along with her son. Admittedly, in spite of respondent returning from Gambia after a long time, the appellant wife had not gone to her matrimonial home along with her child. It appears that she has tried to give lame excuse for the same. At one point of time she has said that she was not aware about the arrival of her husband and at other point she has said that as her son was hardly about 6/7 months she could go to Pune. This itself shows that reason given by the appellant wife is not cogent, consistent and justifiable. We cannot ignore the fact that it is not

the case of the appellant that they were ill or advised by the doctor not to travel. She was staying at Chembur and her matrimonial home was at Pune. Considering the short distance and several modes of transport available for going to Pune it cannot be said that it was not possible for the appellant to go to her matrimonial home, particularly when, her husband was admitted in hospital. It seems that she and her parents had some grudge or grievance against the Respondent. They were expecting the Respondent to come to Chembur immediately after his arrival from Gambia. It is the case of appellant that very fact that respondent on arrival in India did not immediately rush to see his wife and newly borne son shows that he had no intention to keep relations with them. It is true that normally a husband returning after considerable time from abroad is expected to see his wife at the earliest occasion particularly when she has given birth to a child. But merely because on his arrival in India respondent first went to see his parents one cannot jump to the conclusion that husband had no intention to keep relations with wife. We cannot ignore the fact that admittedly after the time the appellant gave a birth to a son, when she was in hospital the respondent had contacted her on telephone from Gambia and had made enquiry about the health of appellant and newly borne son. Under such circumstances the conduct of appellant not returning to matrimonial home after delivery and

meeting her husband particularly when he was admitted in hospital for operation is certainly unjustifiable. This indicates that she had no love and affection for respondent husband and wanted to withdraw from respondent's company. Naturally, having regard to the status and social and cultural back ground of the parties it must be said that conduct of the appellant of not going to Pune when respondent was admitted in hospital must have caused great mental agony to respondent.

25. The second act or conduct of the appellant amounting to cruelty is that when respondent contacted her she avoided to speak and even after the time when respondent had come to India on 21-6-1996 she did not meet him. On the contrary, she expressed that they would meet each other at the residence of respondent's friend viz. Kumar at Vashi. Admittedly, such meeting took place at Vashi. So, this conduct also indicates that appellant was not willing to join respondent. This was also annoying the respondent. Of course, admittedly after the meeting at Kumar's residence respondent took the appellant to his house at Pune on 2-7-1996. It is also an admitted fact that on the next day i.e. on 3-7-1996 there was naming ceremony of the child and he was named as Mehul alies Palash. Admittedly, the appellant and her parents and in particular, mother, did not like that son was named as Palash. It has also come

on record that parents of appellant did not attend the naming ceremony though they were invited by the respondent. On the contrary, it must also be noted that even after the time the Appellant gave birth to a child the parents of respondent had gone from Pune to Chembur and had seen the appellant and newly borne child at the hospital. So, there was in fact no reason for the appellant or her parents to have any grievance about the respondent and his parents and to show any disregard or disrespect to them. It has also come on record that on the next day of naming ceremony, the mother of appellant contacted her on telephone and showed displeasure about the name Palash and on that count there was some quarrel between the appellant and respondent. It has also come on record that with a view that there should not be any quarrel between the appellant and her in-laws and to change her mood, the respondent took the appellant to South India tour during the period from 3-7-1996 to 7-7-1996. The appellant has clearly stated in her deposition that respondent’s behaviour with her was good during the said period. At the same time it has come on record that she had told her parents about the ill-treatment given to her by the respondent and his parents. However, curiously enough we find that she has not uttered even a single word about the nature of said ill-treatment. She has stated that as a result of the said information, her parents had been to Pune in the evening of 7-7-1996 to take her back at their residence.

When we find that there is absolutely no material to show that respondent or his parents had caused ill-treatment of any sort to the appellant why she had called her parents at the matrimonial home. She has also stated that on that day quarrel took place between her parents and respondent as well as between her parents and respondent's parents. She has also alleged that at that time she was confined by the respondent in a bed room and respondent had even tried to throw the minor son out of gallery. Her brother was also man-handled by the respondent and his parents and as a result of all this she went to Kothrud Police Station and lodged a complaint. It is an admitted fact that a Police complaint was lodged by her against respondent and his parents and they were arrested for the offences punishable under Section 498A, 323, 504, 352 and 506A read with 34 of IPC. A criminal case was then filed against them but after full trial of the said case, they were acquitted. It is pertinent to note that in his written statement the appellant has not at all mentioned that on 7-7-1996 she or her parents or brother were beaten. What is important to be noted is that appellant has not even bothered to produce the copy of the said complaint in the instant case. Not only that but she has not even examined her parents or brother, in order to corroborate her version. She has miserably failed to prove that on 7-7-1996 the respondent or his parents assaulted her and that there was justifiable cause for

her to file a criminal complaint. On the contrary, she has clearly stated in her deposition that she had no personal grievance against the respondent and she was living happily at Gambia and few days prior to the filing of the said complaint, they had been to South India tour and there behaviour of the respondent was good. It is worth to note that during the period from 11-5-1993 to 7-7-1996 when appellant was at Gambia she was happy. She had no long stay at her matrimonial home at Pune. She had lived with her-in-laws hardly for fifteen days. So, under such circumstances it is very difficult to believe that she was harassed by respondent or his parents. So, it was not proper on her part to lodge a case under Section 498A and other Sections of IPC against the respondent. That action of the appellant was certainly not justifiable. It was done only with a view to trouble and cause damage to the reputation and image of the respondent and his parents. It has certainly caused great mental torture to respondent. In G.V.N.Kameshwara Rao V/s G.Jabilli **(2002) 2 SCC 296** Their Lordships of the Supreme Court have held that false police complaint and consequent loss of reputation and standing in society at the instance of one’s spouse, would amount to cruelty. It is true that in the instant case it is not specifically held by the Judicial Magistrate,First Class, who tried the said case that complaint was false and suit filed by the parents of the respondent for damages is also

dismissed but that by itself is not sufficient to justify the conduct of the appellant particularly when there is absolutely no evidence to show that respondent had actually ill-treated or harassed the appellant or she was subjected to cruelty. So, filing of such type of criminal case against husband must be considered to be an act of cruelty. That only indicates that some how, the appellant and her parents wanted to implicate the respondent falsely and see that their image and reputation is damaged.

26. It is the contention of the appellant that after the time consent terms were signed by the parties, respondent went to Gambia and he contacted her on telephone and threatened that if she would reach to Gambia he will take revenge and then she would not be in a position to do anything because Indian laws are not applicable in Gambia. According to her she, therefore, became helpless and submitted an application in Bandra Court for withdrawing her consent. However, if we peruse her deposition which is at Exh.33 we find that she has not at all adduced any evidence in this behalf. Besides, there is nothing on record to show that respondent had in fact given any such threats on telephone. Moreover,if really such threats would have been given by the respondent husband then the appellant would have definitely lodged a complaint in that behalf before Family Court, Bandra immediately. But that has

not happened. On the contrary, it is only on 1-4-1997 the appellant moved an application seeking permission to withdraw from the consent terms. She has not even bothered to place on record in this proceeding the copy of the said application, so as to enable this Court to know as to what were the exact allegations that were made by the appellant at that time. This long delay in filing an application for withdrawal of consent itself shows that such threats must not have been given by the respondent husband. What is more to be noted is that respondent husband had made necessary arrangement for bringing the appellant and her son to Gambia and for that purpose after spending Rs.72,000/- he had sent the tickets to his father for handing it over to the appellant. Those tickets were actually produced by the father of the respondent in the family Court. However, the appellant refused to take those tickets at that time. So, it is very clear that the appellant in fact played a trick and after the time the respondent withdrew his earlier divorce petition from Pune Court the appellant backed out from the consent terms which were in fact signed by her. So, this conduct also caused mental torture to the respondent.

27. It is pertinent to note that admittedly thereafter the appellant moved an application before the Family Court at Bandra and prayed that respondent husband has committed breach of an order passed by the Family Court

whereby he was restrained from going to Gambia without permission of the Court and as such he be detained in civil prison. Here also it must be noted that appellant herself had in fact expressed in consent terms that as a result of the said consent terms the respondent would be in a position to go to Gambia on the fixed date but subsequently she backed out and when she found that respondent has actually gone to Gambia she filed an application for detaining him in civil prison for breach of Court's order. So, this also shows the cruel mentality and intention of the appellant to harass the respondent by any means.

28. It must also be noted that when she had filed the maintenance petition, she had submitted an application for impounding pass port of respondent. This was also with a view that if such pass port is impounded then respondent would not be in a position to go to Gambia and resume his duties. Thus the appellant tried to see that respondent is harassed some way or other. Thus we find that all this conduct of the appellant wife amounts to cruelty as contemplated under Section 13(1)(ia) of the said Act.

29. It is the case of the respondent that appellant deserted him on 8-7-1996 and thereafter she never returned to him. He therefore filed divorce Petition No.595 of 1998 in Family Court, Pune on 20-7-1998. It

is pertinent to note that even respondent has also clearly admitted in written statement as well as in deposition that after she left the matrimonial home on 8-7-1996 she never went to respondent. However, she has tried to contend that as a result of the harassment caused to her by respondent and his parents she was constrained to leave her matrimonial house. At the cost of repetition, it must be mentioned that respondent has not at all adduced any evidence worth the name to show that respondent and his parents caused any ill-treatment or harassment to her. On the contrary time and again, she has stated in her deposition that personally she was not having any grudge or grievance against respondent. She has also admitted that when she was at Gambia she was residing happily. Not only that even at the time when they had been to South India tour, just prior to 8-7-1996, the behaviour of respondent was good. So, there is absolutely nothing on record to indicate that there was any harassment or ill-treatment, as a result of which it became necessary for her to leave the matrimonial house. On the contrary, it does appear from material on record that on 7-7-1996 the parents of appellant had been to the house of respondent with a view to take her with them and on that day the appellant actually went with them and thereafter filed police complaint. It is very pertinent to note that even after filing the complaint, she asked the respondent to return her all ornaments and as such respondent returned all

the ornaments to her in the police station. So, this conduct of appellant clearly establishes that when she left the matrimonial home on 8-7-1996 it was her intention to put an end to the marital relations and to dis-associate herself from the company of respondent. Though the appellant tried to show that she was having some harassment at the hands of parents of Respondent or that respondent had also threatened her, she has not specifically adduced evidence in that behalf. All that she has said is that respondent had told that when she resides with his parents she should behave as per the say and wishes of his aged parents. We feel that if the respondent has said accordingly to the appellant he had not committed any error. By no stretch of imagination it can be said that by saying so, he had given any threat or that it had created any apprehension in the mind of the appellant that it would be dangerous on her part to live in the matrimonial home. On the contrary, from the perusal of the letter which is written by the respondent's father to appellant, Exh.17 dated 17-2-1997, we find that respondent's father was treating the appellant and her son affectionately and used to take their care. The appellant has nowhere stated that parents of respondent had asked her to do any wrong thing. Thus we have absolutely no hesitation to hold that appellant left the matrimonial home on 8-7-1996 without any justifiable cause and she had done so with an intention to bring the cohabitation with respondent

permanently to an end. Thus factum and animus deserndi on the part of appellant is fully established.

30. From the evidence on record it is very clear that right from 8-7-1996 till today the parties are residing separately. Admittedly, the appellant had not filed any application for restitution of conjugal rights. On the contrary, the facts clearly establish that there is irretrievable break down of the marriage of the appellant and respondent. Even during pendency of this appeal attempts were made by us to explore the possibility of settlement. However, the same did not materialise.

31. The learned advocate for the appellant argued before us that in the instant case even if it is held that there is irretrievable break down of a marriage, the respondent cannot get decree for divorce on that ground. For this proposition, the learned Advocate for the appellant has drawn our attention to a case Shyam Sunder Kohli V/s Sushma Kohli @ Satya Devi **2005(1) Mh.L.J. 380**, wherein, the Apex Court has held that it is only in extreme circumstances the Court may dissolve the marriage on the ground that there has been irretrievable break down of marriage. The proposition in the above cited ruling is not disputed and cannot be disputed. However, in that case it was held that respondent wife was at all stages ready to go back to

her husband but husband was not ready and therefore it was held that as the husband has not allowed the marriage to work he was not entitled to get divorce on the ground of irretrievable break down. However, in the instant case we have already mentioned that there was no fault on the part of the respondent husband. On the contrary, the appellant wife was at fault. There was absolutely no reason for her to leave her matrimonial home once for all and to abandon the marital relations with respondent husband. So, the above stated case is not helpful to the appellant.

32. In view of above, we are of the view that learned family Court Judge has appreciated the entire evidence on record in its proper perspective and has correctly held that the appellant wife is guilty of cruelty and desertion as contemplated under Section 13(1)(ia) and (ib) of the said Act. There is no reason to interfere with the said decision.

33. In this view of the matter the appeal is dismissed with no order as to costs.

(S.R.SATHE,J.) (S.B.MHASE,J.)